STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Mark T. Boonstra, Patrick M. Meter, and Deborah A. Servitto (dissenting)

ALAN JESPERSON,

Plaintiff-Appellant,

v

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

Supreme Court No. 150332

Court of Appeals No. 315942

Lower Court No. 2010-005127-NI

_____/

LAW OFFICES OF MICHAEL J. MORSE, PC
MICHAEL J. MORSE (P 46895)
ERIC M. SIMPSON (P 57232)
Attorneys for Plaintiff-Appellant
24901 Northwestern Highway, Suite 700
Southfield, MI 48075
(248) 350-9050; Fax (866) 855-8071
eric@@855mikewins.com

MARK GRANZOTTO, PC
Mark R. Granzotto (P 31492)
Appellate counsel for Plaintiff-Appellant
2684 11 Mile Rd, Suite 100
Berkley, MI 48072
(248) 546-4649; fax (248) 591-2304
mg@granzottolaw.com

SECREST WARDLE
BRIAN E. FISCHER (P 28978)
DREW W. BROADDUS (P 64658)
Attorneys for Defendant-Appellee
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966; Fax (616) 285-0145
dbroaddus@secrestwardle.com

_____/

DEFENDANT-APPELLEE AUTOMOBILE CLUB INSURANCE ASSOCIATION'S BRIEF ON APPEAL

Oral Argument Requested

Dated: June 30, 2015

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

COURT RULES

MISCELLANEOUS

STATEMENT REGARDING QUESTIONS PRESENTED

I. IN THIS FIRST-PARTY NO-FAULT ACTION, DID AAA'S AFFIRMATIVE DEFENSE NO. 3 – WHICH SPECIFICALLY CITED MCL 500.3145(1) – PUT THE PLAINTIFF ON NOTICE OF A POTENTIAL STATUTE OF LIMITATIONS ARGUMENT?

The Trial Court did not directly answer this question.

The Court of Appeals did not directly answer this question but said "arguably" yes.

Plaintiff-Appellant says: "no."

Defendant-Appellee AAA says: "yes."

II. DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION TO CONSIDER AAA'S STATUTE OF LIMITATIONS DEFENSE, WHERE AAA ORALLY MOVED FOR LEAVE TO AMEND ITS AFFIRMATIVE DEFENSES, THE TRIAL COURT CONSTRUCTIVELY GRANTED LEAVE WHEN IT PROCEEDED TO HEAR AND GRANT THE MOTION FOR SUMMARY DISPOSITION, AND PLAINTIFF SUFFERED NO UNFAIR PREJUDICE AS A RESULT OF AAA'S SUPPOSEDLY "LATE" INVOCATION OF THIS DEFENSE.

The Trial Court constructively said: "yes."

The Court of Appeals said: "yes"

Plaintiff-Appellant says: "no."

Defendant-Appellee AAA says: "yes."

III. DID THE LOWER COURTS CORRECTLY INTERPRET THE ONE YEAR NOTICE PROVISION OF MCL 500.3145(1) IN HOLDING THAT AAA WAS ENTITLED TO SUMMARY DISPOSITION, WHERE IT IS UNDISPUTED THAT PLAINTIFF DID NOT PROVIDE AAA WITH WRITTEN NOTICE OF HIS CLAIM WITHIN ONE YEAR OF THE MAY 12, 2009 MOTOR VEHICLE ACCIDENT, PLAINTIFF DID NOT FILE SUIT WITHIN ONE YEAR OF THE ACCIDENT, AND AAA DID NOT PAY ANY NO-FAULT BENEFITS WITHIN ONE YEAR OF THE ACCIDENT?

The Trial Court said: "yes."

The Court of Appeals said: "yes,"

Plaintiff-Appellant says: "no."

Defendant-Appellee AAA says: "yes."

INTRODUCTION

The plain language of MCL 500.3145(1) requires that something happen within one year after a motor vehicle accident, in order for a claimant to bring a suit for personal protection insurance ("PIP") benefits. Either the claimant must provide written notice to the carrier *within that year,* the claimant must file suit *within that year,* or the carrier must make a payment *within that year.*[1] Here, Plaintiff-Appellant Alan Jesperson ("Plaintiff") acknowledges that he "did not provide written notice to" Defendant-Appellee Auto Club Insurance Association ("AAA") "within one year of the accident." (Appellant's Brief, p 14.) Plaintiff further acknowledges that he did not file suit against AAA until May 16, 2011, approximately two years after the May 12, 2009 accident. (Id., p 2.) Also, Plaintiff acknowledges that AAA did not make any payments until September 2010, approximately one year and four months after the accident. (Id., p 1.)

However, Plaintiff argues that his suit for PIP benefits was timely on the basis of payments made by AAA "[b]eginning on September 27, 2010." (Id.) Plaintiff argues that these payments – which AAA was under no obligation to make – resurrected an otherwise time-barred PIP claim by virtue of the following language:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident *or unless the insurer has previously made a payment of personal protection*

[1] See Logeman, *Michigan No-Fault Automobile Cases: Law and Practice*, 3rd Ed (2011 Supp), § 6.14 (Appendix 25b, 26b): "There is a one-year limitation of action unless the claimant gives the insurer written notice of the accident within one year of the accident *or the insurer makes payment within one year.*" (Emphasis added.) See also Sinas and Miller, *Motor Vehicle No-Fault Law in Michigan* (2011 Ed), p 399 (Appendix 29b): "It is clear from the statutory language that a claimant … must give the requisite written notice to the proper insurance company within one year of the date of the accident or the claim for no-fault benefits will be *forever barred. The only thing* that excuses this is if the insurer has paid something on the claim *during the first one year following the accident.* (Emphasis added.)

> *insurance benefits for the injury. If the notice has been given* or a payment has been made, *the action may be commenced at any time within 1 year after the most recent allowable expense,* work loss or survivor's loss has been incurred…. (Appellant's Brief, p 13, quoting MCL 500.3145(1), emphasis added.)

In short, Plaintiff interprets the italicized language to allow for a suit to be filed anytime, so long as "the insurer has previously made a payment." In Plaintiff's view, the word "previously" refers to the filing of the Complaint for PIP benefits, whereas AAA argues that the word "previously" refers to the expiration of "1 year after the date of the accident." (See Appellant's Brief, p 18.) The Circuit Court and the Court of Appeals agreed with AAA. There are a number of problems with Plaintiff's interpretation which would defeat the purpose of the one-year limitation period – and turn a provision that was written to cap the time period for bringing actions into a Statute Without Limitations.

First, Plaintiff would read the "[i]f the notice has been given or a payment has been made" clause in isolation, without reference to the preceding sentence. Plaintiff's reasoning would allow for *any* payment *ever* – no many how many years after the accident – to open the door to a suit "within 1 year after the most recent allowable expense." (Appellant's Brief, p 16.) But if we were to read the second sentence of § 3145(1) this way – without reference to the preceding sentence – then *any* notice *ever* would also allow a claimant to file suit "within 1 year after the most recent allowable expense."[2] Such a reading would nullify the requirement –

[2] In this regard, Plaintiff's reliance upon the second sentence of § 3145(1) also commits the "fallacy of begging the question … consists in taking for granted precisely what is in dispute, in passing off as an argument what is really no more than an assertion of your position." *Wilburn v Commonwealth*, 312 SW3d 321, 334 (Ky 2010) (Noble, J., dissenting). Or, put another way, "[t]he fallacy of begging the question occurs when a claim is dependent on another claim that is implicitly assumed but has not been established in the argument." *Pioneer Ridge Nursing Facility Operations, L.L.C. v Ermey*, 41 Kan App 2d 414, 421; 203 P3d 4 (2009). Plaintiff's position presupposes that AAA's payments starting 14 months post-accident had some legal significance relative to the statute of limitations - which is precisely what is in dispute.

established by the first sentence of § 3145(1) – that written notice be provided within one year after the accident. "Words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *Sweatt v Department of Corrections*, 468 Mich 172, 180 n 4; 661 NW2d 201 (2003). "A general rule of statutory construction is that words or phrases shall be read in context...." *Deur v Newaygo Sheriff*, 420 Mich 440, 445; 362 NW2d 698 (1984).

Second, under Plaintiff's interpretation, the "or unless" clause would operate so that *any* payment by the insurer *ever* would resurrect an otherwise stale claim. Claimants could submit a bill a year and a day after an accident, five years after an accident, or even twenty years after an accident, in the hopes that the insurer pays it. If, by some oversight, the insurer does so, then it would be opening the door to open ended responsibility for whatever future "allowable expenses" the claimant then attributes to the long ago motor vehicle accident. This would create a tremendous disincentive to promptly paying claims, contrary to the Act's purpose of ensuring "prompt payment to the insured." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008). Insurers cannot be put in fear of paying claims, as it would impede "the primary goal of the no-fault act," which "is to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *McCormick v Carrier*, 487 Mich 180, 234; 795 NW2d 517 (2010).

While Plaintiff suggests that this disincentive would be tempered by the "one year back rule of § 3145(1)" (Appellant's Brief, p 21) – since the resurrected claim could only include losses incurred within the year leading up to the complaint's filing – this argument overlooks the fact that for "allowable expenses," the Act provides for "unlimited lifetime benefits." *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012). So a single erroneous payment

years after the accident could, under Plaintiff's interpretation, have significant consequences *going forward*, which the "one year back rule" would not protect against.

Third, and perhaps most problematic, the resurrected claim – which, under Plaintiff's interpretation, would be brought into being by any payment more than a year after the accident – *would not be subject to any statute of limitations.* Plaintiff previously claimed that the "second sentence of § 3145(1)" takes care of this problem by requiring that "a case must still be commenced within one year of the most recent allowable expense." (Application, p 12.)[3] But an "allowable expense" could be incurred years, if not decades, after the accident. A claimant who had otherwise sat on his or her rights would only need to submit the claim for payment (or perhaps a series of relatively small claims, hoping at least one "flied under the radar") and, if the insurer were to accidentally pay it, the door is reopened for any other "allowable expenses" that may follow.

Say, for example, a person is involved in a motor vehicle accident and experiences minor back pain. Thinking that the injury is minor, she does not provide written notice to her insurer within a year of the accident. However, she continues to experience back pain and seeks treatment two years after the accident. Chiropractic care is prescribed, and the chiropractor submits a relatively small bill to the insurer. The insurer, despite not having been timely notified of the potential claim, for some reason pays it. Because "a payment has been made," the door is now open. Then, five years after that, the claimant's treating physician determines that chiropractic care is not working, and that surgery will be required, due to a condition that allegedly relates to the now seven year old accident. Because "a payment has been made," and

[3] Plaintiff now seems to acknowledge – and in fact embrace – the fact that his construction would eviscerate any "temporal limitation" on filing suit when the insurer "has made a payment." (Appellant's Brief, p 18.)

because the "allowable expense" of this surgery would only now be "incurred," a lawsuit to recover the expense of this surgery would be timely under Plaintiff's interpretation of the statute. This problem is in no way cured by the second sentence of § 3145(1).[4] Once an accident has occurred, an insurer would never be able to rule out a potential claim – even when nothing happened within a year of the accident – so long as the insured is alive, because there would always be the specter of some delayed "allowable expense" that could become recoverable by virtue of the accidental or gratuitous payment of a belatedly submitted bill.

In short, of the two competing interpretations of § 3145(1), only one – the one accepted by the Circuit Court and the Court of Appeals – carries out the Legislature's intent that the *potential* for PIP claims at some point be foreclosed within a certain period of time after the accident occurs. And for reasons explained below, AAA did not waive this argument, and the lower courts were right to consider (and accept) it.

[4] Moreover, because the record in this case is devoid of any reference to when the last "allowable expense" was incurred, this interpretation would do nothing to establish the timeliness of Mr. Jesperson's suit against AAA.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff was involved in a low-impact accident on May 12, 2009, when the motorcycle he was operating was rear-ended by a motor vehicle driven by Matthew Badelalla. (Appendix 1b, 2b.) The impact was apparently between the front right tire of Badelalla's vehicle and the exhaust pipe of Plaintiff's motorcycle. (Id., pp 2b, 3b.) That impact did not cause the motorcycle to tip over and Plaintiff did not get knocked down by the impact. (Id.) Plaintiff jumped off the motorcycle and later "righted" the bike before leaving the scene of the accident. (Id.) Plaintiff did not report any injury to the officers at the scene. (Appendix 4b.) He returned to work as a carpenter the day of the accident, and continued to work as a carpenter for more than a year after the accident. (See Id.) In the year following the accident (May 12, 2009-May 12, 2010), Plaintiff did not file any type of suit, Plaintiff did not provide any written notice to AAA, and AAA did not make any payments to or for the benefit of the Plaintiff. (Appellant's Brief, pp 1-2.) Later, Plaintiff claimed injuries to his, neck, back, and shoulders. (Appendix 3b.)

Plaintiff filed a third-party action against Mr. Badelalla and Badelalla's employer (Mr. Badelalla was delivering pizzas at the time of the accident) on December 1, 2010. (See Appendix 13a.) AAA was not added to the case until May 16, 2011, more than two years after the accident, by way of Plaintiff's Second Amended Complaint. (Appellant's Brief, p 2.) The matter proceeded through discovery as a combined first and third-party case, but the first and third-party cases were scheduled for separate trials. (See Appendix 8a, referencing the order "to bifurcate claims for trial" entered on October 29, 2012.) The third-party suit resulted in a no-cause verdict on December 6, 2012. (Appendix 6a.)

The Circuit Court scheduled the first-party suit for trial on February 19, 2013. (Appendix 5a.) On January 28, 2013, AAA filed a Motion for Summary Disposition, arguing that Plaintiff's first-party suit was untimely under MCL 500.3145(1) for the following reasons:

1. This action arises out of an alleged May 12, 2009 motorcycle/motor vehicle accident.

2. Pursuant to MCL 500.3145(1), a lawsuit for no-fault benefits is barred unless the claimant gives written notice of the injury within one-year of the motor vehicle accident or the insurer paid no fault benefits within one-year of the accident date.

3. The one-year notice rule in MCL 500.3145(1) is a statute of limitations that bars the claim in cases of noncompliance and a showing of prejudice is not required. *Davis v Farmers Insurance Group*, 86 Mich App 45 (1978).

4. That Plaintiff did not provide written notice within one year of the accident date.

5. Defendant did not receive notice of the May 12, 2009 accident until June 2, 2010, more than one-year after said accident when Defendant's insured contacted Defendant.

6. Defendant did not pay benefits to Plaintiff between May 12, 2009 and May 12, 2010, within the one-year period.

7. The one-year notice rule contained under MCL 500.3145(1) bars this action. (Appendix 5b, 6b.)

Plaintiff filed a Response on February 12, 2013, arguing (1) AAA was barred from raising the argument because it supposedly was not stated in its Affirmative Defenses, (2) AAA's position was defeated by the "or unless" language of § 3145(1), as AAA made payments starting more than a year after the accident and this supposedly resurrected the claim,

and (3) the "mend the hold"[5] doctrine purportedly "estopped" AAA from "asserting this defense." (Appendix 12b-15b.)

The Circuit Court heard AAA's motion on February 19, 2013,[6] and granted the motion for the following reasons:

> …It's clear from the statutory language … that a claimant or someone acting on the claimant's behalf must give the requisite written notice to the proper insurance company within one year of the date of the accident or the claim for no-fau1t benefits will be forever barred. The only thing that excuses this is if the insurer has paid something on the claim during the first one year following the accident.
>
> Now, when we're trying to make sense of the statutory language in 3145(1), one way of reading it is that, and Plaintiff is suggesting that it should be read to say: That if the insurer ever made a payment, then the suit could be brought at any time. It's without limitation.

---

[5] The "mend the hold" doctrine requires that "when a loss under an insurance policy has occurred and payment refused for reasons stated, good faith requires that the company shall fully apprise the insured of all the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice." *Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 122-123; 208 NW 145 (1926). The doctrine does not appear to have been discussed in a published Michigan decision in nearly 60 years. See *C. E. Tackels, Inc v Fantin*, 341 Mich 119, 124; 67 NW2d 71 (1954). In the Circuit Court, AAA argued that this argument constituted an impermissible attempt to invoke equity, in order to avoid the dictates of a statute. See *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 347; 820 NW2d 242 (2012). In any event, Plaintiff abandoned this argument on appeal. See *Lash v Traverse City*, 479 Mich 180, 201 n 6; 735 NW2d 628 (2007) (Kelly, J., concurring in part and dissenting in part). "[A] party abandons an issue by failing to specifically raise it in the statement of questions presented." *Id.*

[6] During this argument, Plaintiff's counsel asserted that *English v Home Ins Co*, 112 Mich App 468, 470; 316 NW2d 463 (1982) was "directly on point" (Appendix 71a), although it had not been cited in Plaintiff's brief and Plaintiff's counsel could not provide a copy of it at the hearing. It is unclear how *English* would have supported Plaintiff's position, as the insurer in *English* began making payments within six months of the accident. *English, supra* at 470 ("On November 29, 1973, plaintiff suffered injuries in an automobile accident. Defendant paid no-fault insurance benefits through May 13, 1974.") In the instant case, it is undisputed that no payments were made within the year following the accident (Appendix 70a), a fact which renders *English* inapposite.

> Not to be ridiculous, but if a payment was made in this case in July of 2010, if that's the rule, then you could bring a lawsuit ten years later because it's without limitation. There are no words of limitation for that.
>
> I'm looking at the language in this Chapter 9 [of the Sinas and Miller treatise discussed below]: PIP Claim Processing and Litigation. These rules contain pitfalls for the unwary and, therefore, it is important to thoroughly understand these rules and exercise great caution with regard to their implementation. The beginning point of making any claim for no-fault benefits is to comply with the written notice provisions of Section 3145, Subsection l of the Act. Unless these provisions are [complied with], a claim will be, in bo1d, permanently forfeited. (Appendix 72a-74a.)

In support of this holding, the Circuit Court found the following excerpt from Sinas and Miller, *Motor Vehicle No-Fault Law in Michigan* (2011 Ed), p 399 to be persuasive:

> It is clear from the statutory language [of MCL 500.3145(1)] that a claimant, or someone acting on the claimant's behalf, must give the requisite written notice to the proper insurance company within one year of the date of the accident or the claim for no-fault benefits will be *forever barred*. The only thing that excuses this is if the insurer has paid something on the claim *during the first one year following the accident.* (Appendix 29b; see also Appendix 73a.)

Plaintiff moved for reconsideration, offering an affidavit from Wayne Miller, one of the treatise's authors. (Appendix 23b, 24b.) Here, Mr. Miller averred that he had "carefully reviewed both the statute and my[7] textbook commentary" and that he "now believe[s] that my comments do not accurately reflect the text of the statute." (Id.) Mr. Miller further averred that in future editions, the comment will state: "[t]he only thing that excuses this is if the insurer has, notwithstanding the lack of proper notice, paid something on the claim." (Id.)

[7] Ignoring the fact that the volume was *co-authored* by Mr. Miller *and* George Sinas.

The Circuit Court denied reconsideration in an April 9, 2013 Opinion and Order:

> In the case at bar, it is undisputed that (1) plaintiff did not file this action within one year of the accident, (2) no notice to the insurer was provided within one year after the accident, and (3) defendant made no payments within one year after the accident. Notwithstanding Wayne Miller's affidavit regarding his revised interpretation of MCL 500.3145(1), the Court of Appeals has opined [that] "MCL 500.3145(1) of the No-Fault Act requires that a claim for personal protection insurance benefits be filed within one year of the accident causing the injury unless a prescribed form of notice was either provided to the insurer or *the insurer paid benefits within one year after the accident.*" *Velazquez v MEEMIC*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2006 (Docket No. 264776) [Appendix 31b, emphasis added by the Circuit Court].
>
> While *Velazquez* is unpublished and therefore not binding on the Court, the plain language of the statute itself supports the conclusion that MCL 500.3145(1) imposes a one year statute of limitations on claims unless notice has been provided "or unless the insurer has *previously* made a payment of personal protection insurance benefits for the injury." MCL 500.3145(1) (emphasis added). The use of the term "previously" implies that the payment must have been made "previously" to some other event. The only time period mentioned in this sentence of MCL 500.3145(1) is the passage of "1 year after the accident causing the injury." As such, the statute is properly read as requiring either (1) notice to an insurer within one year after the accident or (2) payment of personal protection insurance benefits prior to the time that notice would have been required to have been given (i.e. within one year after the accident).
>
> The Court's conclusion is further supported by the fact that any other interpretation of MCL 500.3145(1) would render the statute of limitations illusory. To wit, a claim could never be forever barred by the statute of limitations, since the original claim would be resurrected if the insurer ever gratuitously decided to make a payment after the statute of limitations has run.
>
> In light of the plain language of MCL 500.3145(1) and the Court of Appeals' decision in *Velazquez, supra*, the Court was – and remains – convinced that the insurer must either (1) be given notice within one year after the accident, or (2) have paid benefits within one year of the accident, in order for an insured to be

> entitled to bring suit under the No-Fault Act…. (Appendix 79a-81a.)

Specifically referencing Mr. Miller's belatedly proffered affidavit, the Circuit Court further noted: "Miller now avers that 'if a no-fault insurer makes a payment at any time, notwithstanding the lack of notice within one year, § 3145 does not appear to serve as a bar to a claimant's further entitlement to no-fault benefits.' … However, Miller cites no authority apart from the text of MCL 500.3145(1) to support his [new] interpretation." (Appendix 80a n 1.) With his Motion for Reconsideration denied, Plaintiff appealed by right to the Court of Appeals.

The Court of Appeals affirmed in a published decision, with the majority adopting AAA's statutory construction argument as follows:

> The statute begins by establishing a general rule that an action for first-party personal protection insurance benefits "may not be commenced later than 1 year after the date of the accident causing the injury." MCL 500.3145(1). However, the statute then provides two exceptions to the general rule, under which a suit may be brought more than one year after the date of the accident. The first exception is where "written notice of injury as provided herein has been given to the insurer within 1 year after the accident." The second exception is where "the insurer has previously made a payment of personal protection insurance benefits for the injury." Although the first exception [not at issue here] explicitly requires that notice have been provided within one year of the accident, the second exception [which this appeal was about] requires that the insurer have "previously" made a payment of insurance benefits.
>
> The question then becomes what the adverb "previously" means in the context of [the second exception]. … The word "previously" means "coming or occurring before something else; prior[.]" … The pertinent issue before this Court is what the "something else" is before which the payment by an insurer must have come or occurred. Plaintiff essentially argues that the "something else" is simply the filing of plaintiff's first-party claim against defendant; defendant argues to the contrary, and the trial court found, that the "something else" is the expiration of one year following the accident. We agree with defendant and the trial court.
>
> ***

> …[T]he Legislature intended that the word "previously" mean previous to "1 year after the date of the accident causing injury." This interpretation is supported by the fact that the Legislature juxtaposed "previously" with "1 year after the date of the accident causing injury," which language thus appears much closer in proximity to the word "previously" than does the Legislature's earlier reference to the commencement of "[a]n action." This interpretation also is supported by two principles of statutory construction: our directive to avoid interpretations that result in absurd consequences, and our directive to avoid interpretations that render portions of a statute nugatory. … To hold, as plaintiff suggests, that any payment made by an insurer would revive a stale claim, no matter how much time has elapsed, would render an absurd result by allowing, potentially, even decades-old claims to be asserted. Further, such an interpretation would essentially eliminate the limitations period of MCL 500.3145(1) in cases where an insurer has ever paid anything on a claim, rather than providing a limited exception that allows for the filing of suit more than one year after the accident in certain circumstances. We decline to adopt plaintiff's preferred interpretation, which we find would be in contravention of the "Legislative purpose in the No-Fault Act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably" and to "protect against stale claims and protracted litigations." …
>
> ***
>
> We therefore hold that MCL 500.3145(1) allows for suit to be filed more than one year after the date of the accident causing injury only if the insurer has either received notice of the injury within one year of the accident or made a payment of personal protection insurance benefits for the injury within one year of the accident. (Appendix 86a-88a.)

The majority rejected the Plaintiff's waiver argument as follows:

> …[L]eave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless such amendment would be futile or otherwise unjustified. … Thus, had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its

> discretion, granted defendant leave to amend its pleading,[8] in which case the result would be the same—the limitations period of MCL 500.3145(1) would still bar plaintiff's claim. Given the trial court's discretion to simply allow amendment of the pleading, and in the interest of judicial efficiency, we see no need to remand the case for the trial court to do just that. Accordingly, we find no waiver of the affirmative defense of statute of limitations. (Appendix 89a.)

Judge Deborah Servitto dissented, finding that the statutory argument had been waived because it was not specifically referenced in AAA's affirmative defenses, and because the trial court never explicitly granted AAA's oral request for leave to amend the affirmative defenses. (Appendix 94a.) Judge Servitto did not express an opinion on the statutory construction argument.

Plaintiff then applied for leave to appeal to this Court. On April 1, 2015, this Court granted Plaintiff's Application and directed the parties to brief "(1) whether the defendant adequately raised the affirmative defense of the one-year statute of limitations stated in MCL 500.3145(1) without explicitly describing it in its answer to the plaintiff's amended complaint; (2) if not, whether the Court of Appeals erred in rejecting the plaintiff's argument that the defendant waived the affirmative defense by pointing to the trial court's authority to exercise its discretion to allow the defendant to amend its answer; and (3) if the defendant did not waive the statute of limitations defense, whether its payment of benefits to the plaintiff more than one year after the date of the accident satisfied the second exception to the one-year statute of limitations established in the first sentence of § 3145(1)." *Jesperson v Auto Club Ins Assoc,* ___ Mich ___; 861 NW2d 47 (2015). (Appendix 98a.)

---

[8] In the Circuit Court, AAA made an oral motion for leave to amend its Affirmative Defenses. (Appendix 67a.) The Circuit Court did not expressly rule on this request, but proceeded to rule on the substance of AAA's statutory argument.

STANDARDS OF REVIEW

The first issue identified in this Court's April 1, 2015 Order – whether AAA's Affirmative Defense No. 3 was sufficient to put Plaintiff on notice of a potential statute of limitations argument – is reviewed on appeal *de novo.* See *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013) (challenges to the sufficiency of pleadings are reviewed *de novo*); *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001) (whether a particular assertion constitutes an affirmative defense is a question of law that is reviewed *de novo*).

The second issue identified in this Court's April 1, 2015 Order – relating to "the trial court's authority to exercise its discretion to allow the defendant to amend its answer" – is reviewed on appeal for an abuse of discretion. "Decisions concerning the meaning and scope of pleadings, and decisions granting or denying motions to amend pleadings, are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). "An abuse of discretion occurs when the decision [of the trial court] results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). The deferential standard applied to such decisions reflects the "trial court's right to manage its docket." *In re City of Dallas*, 445 SW3d 456, 464 (Tex App 2014). See also *Massey v Hoffman*, 184 NC App 731, 733; 647 SE2d 457 (2007) ("Whether a motion to amend a pleading is allowed or denied … is accorded great deference."); *Trispel v Haefer*, 89 Wis 2d 725, 731; 279 NW2d 242 (1979) (noting "the deference accorded to a trial court's determination granting or denying leave to amend").

The third issue identified in this Court's April 1, 2015 Order is reviewed on appeal *de novo.* The trial court granted AAA's Motion for Summary Disposition, and the Court of Appeals affirmed, under MCR 2.116(C)(7) (statute of limitations). Such decisions are reviewed on appeal *de novo*. *DiPonio Construction Co v Rosati Masonry Co,* 246 Mich App 43, 46-47; 631 NW2d 59 (2001). See also *Joseph v Auto Club Ins Ass'n,* 491 Mich 200, 205; 815 NW2d 412, 415 (2012). Likewise, the interpretation § 3145 represents an issue of law that is reviewed *de novo. Joseph,* 491 Mich at 205. Although this Court "reviews a decision to grant a motion for summary disposition *de novo,*" this standard "does not authorize the Court to abandon its neutral role and become plaintiff's counsel." *Kaupp v Mourer-Foster, Inc.,* 485 Mich 1033, 1035; 776 NW2d 893 (2010) (Corrigan, J., dissenting). Moreover, even where the standard is *de novo,* appellate courts should generally have some degree of "preference for affirmance," which "follows from the deference we owe to the [trial] courts and the judgments they reach, many times only after years of involved and expensive proceedings." *Richison v Ernest Group, Inc.,* 634 F3d 1123, 1130 (10th Cir 2011). "Because of the cost and risk involved anytime we upset a court's reasoned judgment, we are ready to affirm whenever the record allows it." *Id.* For this reason, "appellants must always shoulder a heavy burden – they must come ready both to show the [trial] court's error and, when necessary, to explain why no other grounds can support affirmance of the [trial] court's decision." *Id.*

LEGAL ARGUMENTS

I. IN THIS FIRST-PARTY NO-FAULT ACTION, AAA'S AFFIRMATIVE DEFENSE NO. 3 – BY SPECIFICALLY CITING MCL 500.3145(1) – PUT THE PLAINTIFF ON NOTICE OF A POTENTIAL STATUTE OF LIMITATIONS ARGUMENT.

Plaintiff claims that the Circuit Court (and in turn, the Court of Appeals) should not have considered AAA's Motion for Summary Disposition because the particular portion of MCL 500.3145(1) that provided the basis for the motion supposedly was not raised as an affirmative defense. However, the Affirmative Defenses filed by AAA on June 15, 2011 did specifically cite § 3145(1) in Affirmative Defense No. 3. (Appellant's Brief, p 2.) Plaintiff argues that this was not specific enough and that the Affirmative Defense needed to say which specific clause within § 3145(1) was being invoked.

A party is not required to "plead every fact that might conceivably have a bearing on the defense." *Jersevic v Dist. Health Dep't No. 2,* unpublished opinion per curiam of the Court of Appeals, issued March 27, 2012 (No. 306659) (Appendix 34b). "Rather, it is sufficient to plead facts that enable the opposing party to take a responsive position." *Id.*, citing *Stanke v State Farm Mutual Auto Ins Co,* 200 Mich App 307, 317; 503 NW2d 758 (1993). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Jersevic,* unpub op at 3, quoting *Stanke,* 200 Mich App at 317. Here, Plaintiff took a responsive position; had ample time to file a brief in response to AAA's statute of limitations argument, was afforded a hearing, and brought a motion for reconsideration which the trial court gave thorough consideration. (Appendix 78a.) Indeed, Plaintiff had enough time to formulate a "responsive position" that included an affidavit from Wayne Miller, opining that the treatise he co-authored was wrong. (Appendix 23b, 24b.)

Moreover, it is critical to note that the facts that gave rise to AAA's statute of limitations defense were never disputed. See *Horvath v Delida*, 213 Mich App 620, 629-631; 540 NW2d 760 (1995). Plaintiff knew all along that he did not provide written notice or file suit within a year of the accident. This was not a situation where the defendant's delay in asserting the defense deprived the plaintiff of an opportunity to correct the problem. There was no amendment that Plaintiff could have sought, and no discovery that Plaintiff could have conducted, that would have changed the fact that Plaintiff did not provide written notice or file suit within a year of the accident. See, e.g., *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007).

Moreover, "[e]very citizen is assumed to know the law and is charged with knowledge of the provisions of statutes." *Iowa Farm Bureau Federation v Environmental Protection Com'n*, 850 NW2d 403, 427 n 7 (Iowa 2014). See also *Building Officials & Code Adm v Code Technology, Inc*, 628 F2d 730, 733 (1st Cir 1980) (citing precedent from the Massachusetts Supreme Court holding that "[e]very citizen is presumed to know the law…."); *Myers v Graner*, 158 SE 171, 172 (W Va 1931); *McNatt v Citizens' & Southern Bank*, 93 SE 271, 273 (Ga App 1917); *Ex parte Brown*, 78 NE 553, 559 (Ind 1906); *Peck v Hooker*, 23 A 741, 743 (Conn 1892); *Wimbish v Commonwealth*, 75 Va 839, 844 (1880) (the "law is assumed to be known by every citizen from the time fixed for it to go into operation"). Any obligation on the part of AAA to put Plaintiff on notice of the statute of limitations contained in § 3145(1) – the language of which has remained the same since it took effect on March 30, 1973 – must be viewed in light of this longstanding principle.

II. ALTERNATIVELY, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO CONSIDER AAA'S STATUTE OF LIMITATIONS DEFENSE, WHERE AAA ORALLY MOVED FOR LEAVE TO AMEND ITS AFFIRMATIVE DEFENSES, THE TRIAL COURT CONSTRUCTIVELY GRANTED LEAVE WHEN IT PROCEEDED TO HEAR AND GRANT THE MOTION FOR SUMMARY DISPOSITION, AND PLAINTIFF SUFFERED NO UNFAIR PREJUDICE AS A RESULT OF AAA'S SUPPOSEDLY "LATE" INVOCATION OF THIS DEFENSE.

Oral motions are specifically authorized by MCR 2.119(A)(1) ("Unless made during a hearing or trial…."). At the hearing of AAA's Motion for Summary Disposition, AAA argued:

> …[Y]our Honor is well aware, I'm sure, of the fact that Affirmative Defenses can be amended right up … until the judgment is entered. So if that's the question that counsel wants to address, we'll treat this as a motion that way. Allow us to amend. … I could cite you to several cases about your discretion in that area but I'm sure your Honor is familiar with it. So, you have the discretion to consider this and even to allow us to amend the Affirmative Defenses if you so desire.
>
> …I do want to cite the Court to one case about discretion, because that would also apply to any late notice. It's within the Trial Court's discretion always to allow amendment of pleadings at any time prior to judgment. That's [*Jones v Causey*, 45 Mich App 271, 273-274; 206 NW2d 534 (1973)[9]]….
>
> The only other case that I'd like to cite that was not in our brief, your Honor, is that if we're going to talk about: Well, the Affirmative Defense was not exactly what it should have been as the Plaintiff has raised, then what I'd like to say is that delay alone or the specific amendment of the Affirmative Defenses doesn't warrant a denial of a motion to amend. Because the only reason being proffered being that it might be an inexcusable delay. That case, your Honor, is [*Stanke*, 200 Mich App at 321[10]]….

---

[9] "It is within the discretion of the trial court to permit amendments to pleadings at any time prior to judgment. … Both the court rule and the statute [MCL 600.2301] incorporate a policy in favor of allowing amendments when justice would be served." *Jones*, 45 Mich App at 273-274.

[10] "It is a fundamental rule of civil procedure in this state that leave to amend pleadings should be given freely. … Although delay is a factor to be considered in granting a motion to amend pleadings, … delay alone does not warrant denial of a motion to amend. … [A]mendments of pleadings by necessity must come at a point later in time than the pleading they seek to amend. … Thus, there must always be some delay associated with an amendment of a pleading." *Stanke*, 200 Mich App at 321 (citations omitted).

> The bottom line is that we are right on the law on this one, your Honor. And nothing that the Plaintiff can say really changes that. (2/19/13 trans, pp 7-8.)

Based upon this record, the Court of Appels held:

> …[T]he fact is that defendant did not refer to the statute of limitations in any fashion, and instead specifically described its affirmative defense as relating to the one-year-back provision of the statute, thereby arguably suggesting that it was not citing the statute for any other purpose.
>
> However, leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless amendment would be futile or otherwise unjustified. … Therefore, had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend its pleading, in which case the result would be the same – the limitations period of MCL 500.3145(1) would still bar plaintiff's claim. Given the trial court's discretion to simply allow amendment of the pleading, and in the interest of judicial efficiency, we see no need to remand the case for the trial court to do just that. *Jesperson,* 306 Mich App at 647.

The propriety of granting leave to amend under the circumstances of this case, and the fact that such a decision *would not* constitute reversible error, is illustrated by *Ostroth v Regency,* 263 Mich App 1, 5; 687 NW2d 309 (2004):

> Leave to amend should be freely granted when justice so requires. MCR 2.118(A)(2). However, leave to amend should not be granted in the face of undue delay, bad faith, or dilatory motive on the part of the movant, or undue prejudice to the opposing party by virtue of allowance of the amendment. … Although defendant failed to assert the statute of limitations in its previous answers to plaintiff's complaint, and did not move to amend its affirmative defenses until after it raised the statute of limitations defense in its motion for summary disposition, we do not find that defendant's lack of action was the result of bad faith or undue delay. And the amendment did not prejudice plaintiff's ability to respond to the issue. … The mere fact that an amendment might cause a party to lose on the merits is not sufficient to establish prejudice. …

> Therefore, we conclude that the trial court did not abuse its discretion[11] in allowing the amendment.

As alluded to in *Ostroth*, 263 Mich App at 5, amendments "shall" be permitted, in the absence of a "particularized reason" to the contrary, such as undue prejudice. *Weymers*, 454 Mich at 661 n 27. "Prejudice" in this context "does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits." *Id.* at 657. "Rather, 'prejudice' exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id.*

Another instructive decision is *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9-10; 614 NW2d 169 (2000). In *Cole*, the defendant sought summary disposition based on § 4 of the Equine Activity Liability Act (EALA). The panel found that the defendant had not raised this issue in its affirmative defenses. However, the panel still considered the merits of that argument:

> …[A]t the hearing concerning defendant's second motion for summary disposition [where it asserted the EALA defense], the trial court recognized that defendant needed the court's permission to assert the affirmative defense, and then stated, "Let's go ahead." The trial court proceeded to hear the parties' arguments regarding the immunity issue and rendered its ruling based on immunity.

---

[11] Plaintiff's Brief on Appeal in the Court of Appeals did not address the abuse of discretion standard, which would govern the Circuit Court's decision to allow amendment. "[A]n abuse of discretion occurs *only* when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007) (emphasis added). Arguably, Plaintiff's waiver argument was itself waived in the Court of Appeals through Plaintiff's failure to brief the relevant standard of review. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001) (when a party fails to sufficiently brief the merits of an allegation of error, the issue is deemed abandoned on appeal).

> The grant or denial of leave to amend is within the trial court's discretion. … A motion to amend ordinarily should be granted in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment…
>
> Although no motion to amend was filed until after the court ruled, it is clear to this Court that the trial court constructively granted leave to amend by allowing argument and, ultimately, dismissing the action based on the EALA. Because plaintiff briefed the issue and was afforded an opportunity for oral argument in response to defendant's second motion for summary disposition, we find no prejudice. *Cole*, 241 Mich App at 9-10 (citations omitted).

This Court denied Cole's Application for Leave to Appeal without comment. *Cole v Ladbroke Racing Michigan, Inc*, 463 Mich 972; 623 NW2d 595 (2001).

Here, Judge Switalski constructively granted AAA leave to amend its Affirmative Defense No. 3 in much the same manner as the trial judge did in *Cole.* AAA's counsel offered a detailed argument for why leave to amend should be granted. (2/19/13 trans, pp 7-8.) While Judge Switalski did not expressly state "Let's go ahead" as the trial judge did in *Cole,* the record in the instant case is in many ways even more clear. At the end of AAA's argument for leave to amend, Judge Switalski asked for Plaintiff's response, at which point Plaintiff's counsel addressed the substance of AAA's argument under § 3145(1). (2/19/13 trans, pp 8-9.) Judge Switalski then proceeded to consider the § 3145(1) argument on its merits (Id., pp 9-15), like the trial judge did in *Cole.* After Judge Switalski granted summary disposition, Plaintiff's counsel added "[j]ust for the record" that leave to amend the affirmative defenses had not been properly sought in his view. (2/19/13 trans, p 15.) The trial court stated, "[y]our objections are noted" (Id., p 16) – effectively rejecting Plaintiff's argument against granting leave to amend.

Moreover, Plaintiff is unable to show that he was prejudiced by the supposedly "late" invocation of the one-year statute of limitations. Plaintiff had the same opportunity to brief and argue the issue in response to AAA's Motion for Summary Disposition as he would have had if the issue had been raised earlier in the proceeding. AAA filed and served the motion on January 28, 2013. MCR 2.116(G)(1)(a)(i) required that the motion be filed and served "at least 21 days before the time set for hearing," and AAA complied with this by requesting a hearing on February 19, 2013. The time period set by MCR 2.116(G)(1)(a)(i) would have been the same, regardless of when AAA filed its motion. MCR 2.116(G)(1)(a)(ii) gave the Plaintiff until "7 days before the hearing" to file a response, and Plaintiff did in fact file a response within the time period required. Again, this time period would have been the same, regardless of when AAA filed its motion. Plaintiff is not suggesting that he would have made a different or better argument if AAA had filed the motion earlier. This complete absence of prejudice undermines any argument that the Circuit Court abused its discretion. *Ostroth*, 263 Mich App at 5.

Indeed, the propriety of granting leave to amend under these circumstances flows from the very language of MCR 2.118(A)(2): "Leave shall be freely given when justice so requires." Court rules are interpreted using the same principles that govern statutory interpretation. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005); *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002). "If the plain and ordinary meaning of the language employed" in the Court Rule "is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used." *Hyslop*, 252 Mich App at 505 (citations omitted). Under ordinary principles of statutory construction, "use of the term 'shall' indicates a mandatory and imperative directive." *Stand Up For Democracy v Sec'y of State*, 492 Mich 588,

601; 822 NW2d 159 (2012). In other words, MCR 2.118(A)(2) mandates that leave to amend be granted *unless it would be unjust to do so.* See *Weymers,* 454 Mich at 661 n 27.[12] And as noted above, a party does not suffer prejudice simply because "the proffered amendment may cause the opposing party to ultimately lose on the merits." *Id.* at 657.

Moreover, as noted in *Jones,* 45 Mich App at 273-274, MCL 600.2301 also gives trial courts broad discretion to permit amendments "at any time." MCL 600.2301 states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties

In *Bush v Shabahang,* 484 Mich 156, 176-177; 772 NW2d 272 (2009) this Court applied MCL 600.2301 to allow a medical malpractice claimant – in response to the defendant's motion for summary disposition – to amend his pre-suit Notice of Intent. The same considerations that weighed toward allowing the amendment in *Bush* support the Court of Appeals' holding here: permitting the amendment allowed for the adjudication of a meritorious statute of limitations defense, and AAA's failure to articulate the defense earlier did not "affect the substantial rights" of the Plaintiff – again, Plaintiff had the same opportunity to respond to AAA's statute of limitations defense that he would have had if AAA had raised the defense from the beginning.

[12] See also *U.S. v Continental Illinois Nat Bank and Trust Co of Chicago,* 889 F2d 1248, 1255 (2nd Cir 1989) ("the mandate … that leave to amend 'shall be freely given when justice so requires' requires reversal of denials of leave to amend where the challenged denial exceeds the bounds of judicial discretion…."); *Deniece Design, LLC v Braun,* 953 F Supp 2d 765, 776 (SD Tex 2013) (noting that "leave to amend" affirmative defenses "is routinely granted"); *Chevron Corp v Donziger,* 886 F Supp 2d 235, 267 n 201 (SD NY 2012) (same).

Plaintiff suggests that the Court of Appeals needed to remand the case so that Judge Switalski could specifically say that he was granting leave to amend the Affirmative Defenses. (Appellant's Brief, pp 10-11.) Plaintiff does not contest that the Circuit Court would have had the discretion to grant leave to amend, and Plaintiff tellingly did not claim that granting leave to amend would have been an abuse of discretion (Plaintiff merely claims that the trial court "might well have" denied the request). (Id., p 12.) So, although Plaintiff emphatically stated that we should not be concerned about "judicial efficiency" (Id.), Plaintiff is asking this Court to wipe away 1 ½ years of appellate proceedings and a published decision of the Court of Appeals, so that Judge Switalski can explicitly state what he did implicitly on February 19, 2013, and the entire proceeding can start over. It is unclear how this would advance the interests of justice.

Moreover, Plaintiff's Argument I runs contrary to his assertion that "[t]his case presents a significant question as to the appropriate interpretation of MCL 500.3145(1)…." (Application, p 6.) If the real issue is the sufficiency of the trial court record, then Plaintiff is merely arguing for "error correction" and is not presenting anything of "major significance to the state's jurisprudence." MCR 7.302(B)(3). On the other hand, if this is an issue of statewide importance that needs to be reviewed by this Court, then it is hard to see why we should start over. For these reasons, AAA suggests that leave was improvidently granted as to this issue. See, e.g., *Service Source, Inc v DHL Express (USA),* 497 Mich 911; 856 NW2d 60 (2014).

III. THE LOWER COURTS CORRECTLY HELD THAT AAA WAS ENTITLED TO SUMMARY DISPOSITION PURSUANT TO THE ONE YEAR NOTICE PROVISION OF MCL 500.3145(1), WHERE IT IS UNDISPUTED THAT PLAINTIFF DID NOT PROVIDE AAA WITH WRITTEN NOTICE OF HIS CLAIM WITHIN ONE YEAR OF THE MAY 12, 2009 MOTOR VEHICLE ACCIDENT, PLAINTIFF DID NOT FILE SUIT WITHIN ONE YEAR OF THE ACCIDENT, AND AAA DID NOT PAY ANY NO-FAULT BENEFITS WITHIN ONE YEAR OF THE ACCIDENT.

MCL 500.3145(1) states that "[a]n action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced … unless written notice of injury … has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury." "The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf." *Id.* "The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury." *Id.*

MCL 500.3145(1) is subject to ordinary rules of statutory interpretation. See *Joseph,* 491 Mich at 205-206. "In reviewing questions of statutory construction, [a court's] purpose is to discern and give effect to the Legislature's intent." *People v Holder,* 483 Mich 168, 172; 767 NW2d 423 (2009). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written." *Id.* "We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain legislative intent." *Id.* Courts may not "rewrite the plain statutory language and substitute [their] own policy decisions for those already made by the Legislature."

DiBenedetto v West Shore Hosp, 461 Mich 394, 405; 605 NW2d 300 (2000). Courts have "no authority to add words or conditions to [a] statute." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214 n 10; 731 NW2d 41 (2007).

"[T]he policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005). "The Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statute as written." *Id.* at 425. The "Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature." *Id.* (citation omitted). Even when "the Legislature's policy choice can be debated," the "judiciary is not the constitutional venue for such a debate." *Id.*[13]

Here, the text of § 3145(1) actually "contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered." *Joseph*, 491 Mich at 207. "(1) An action for personal protection insurance [PIP] benefits must be commenced not later than

[13] Or as this Court explained in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 64; 718 NW2d 784 (2006), litigants cannot ask "that all the disciplines that judges, lawyers, and even lay people use for giving meaning to documents and distinguishing in a principled fashion between potentially conflicting instruments … be disregarded" so that courts can "raise our eyes from the tedious page, weigh who is the most compelling litigant, and 'effect legislative intent.'" Such arguments beg "the question … of why the words the Legislature used do not do that better than their efforts to find the 'real intent.'" *Id.* "Moreover, with a system of mandatory automobile no-fault insurance such as the Legislature has enacted, it just may be, because of the economies required to make it work, that the Legislature's 'real intent' was to set up strict rules that can unfortunately, but unavoidably if you want no-fault insurance, produce some sad outcomes." *Id.* Although *Cameron* was overruled by *Univ of Mich Regents v Titan Ins Co*, 488 Mich 893, 794 NW2d 570 (2010), *Cameron* was expressly reinstated by *Joseph*, *supra* at 221.

one year after the date of accident, unless the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury." *Joseph*, 491 Mich at 207, quoting *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005). "(2) If notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred." *Joseph*, 491 Mich at 207. "(3) Recovery is limited to losses incurred during the one year preceding commencement of the action." *Id.*

Put more succinctly, "§ 3145(1), does two things. First, it provides that an action to collect PIP [personal injury protection] benefits must be commenced within one year after the date of the accident. … Second, it provides that a claimant may not recover benefits for losses incurred more than one year before the date the action was commenced." *Cameron*, 476 Mich at 92 (Cavanagh, J., dissenting). "The purpose of the one-year period of limitations is to encourage claimants or persons acting on their behalf to bring their claims to court while those claims are still fresh." *Id.* (citations omitted).[14]

[14] Plaintiff suggests that *Cameron*, 476 Mich at 61 supports his interpretation of the statute. (Appellant's Brief, pp 15, 19.) However, the portion of the *Cameron* opinion relied upon by Plaintiff merely quotes the statute. (Appellant's Brief, pp 15, 19.) The Plaintiff's argument in this regard therefore represents an exercise in circular reasoning. Plaintiff says his suit was timely under the statutory language; in support of that he cites page 61 of *Cameron*; but page 61 of *Cameron* merely repeats the statutory language. Moreover, because the issue presented here (a payment made after one year of the accident, where there had been no timely notice and no timely lawsuit) was not raised in *Cameron*, any discussion of this issue that might be found in *Cameron* would be *dicta*. This Court has defined *dicta* as "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Wold Architects and Engineers v Strat*, 474 Mich 223, 233 n 3; 713 NW2d 750 (2006). A case cannot be controlling precedent as to an issue it did not actually consider. *Sizemore v Smock*, 430 Mich 283, 291 n 15; 422 NW2d 666 (1988).

This appeal concerns the first limitation, i.e., the limitation "on the time for filing suit" as identified in *Joseph*. Specifically, when Alan Jesperson first filed suit against AAA on May 16, 2011 (by way of his Second Amended Complaint), Mr. Jesperson *had not provided any prior written notice of his claim to AAA.* Plaintiff's accident occurred on May 12, 2009, and the statute required Plaintiff to provide "written notice of injury … to the insurer within 1 year after the accident…." MCL 500.3145(1).

The plain language of § 3145(1) makes clear that the Legislature intended for *something to happen in the first year* following an accident, in order for a first-party suit to ever arise from it. This interpretation is supported by the following excerpt from Sinas and Miller, *supra* at 399, which is quoted above but bears repeating here:

> It is clear from the statutory language [of MCL 500.3145(1)] that a claimant, or someone acting on the claimant's behalf, must give the requisite written notice to the proper insurance company within one year of the date of the accident *or the claim for no-fault benefits will be forever barred*. The only thing that excuses this is if the insurer has paid something on the claim *during the first one year following the accident*. (Appendix 29b, emphasis added.)

Or as Logeman put it – writing several years before the Court of Appeals' published ruling in this case – "[t]here is a one-year limitation of action unless the claimant gives the insurer written notice of the accident within one year of the accident *or the insurer makes payment within one year*." (Appendix 26b, emphasis added.)[15] Or as Sinas and Miller also wrote several years before the Court of Appeals decided this case, "[t]he *only* thing that excuses [non-compliance

[15] Also, the Court of Appeals wrote in 2006 in *Velazquez*: "MCL 500.3145(1) of the No-Fault Act requires that a claim for personal protection insurance benefits be filed within one year of the accident causing the injury unless a prescribed form of notice was either provided to the insurer or the insurer paid benefits *within one year after the accident.*" (Appendix 32b, emphasis added.)

with the one-year statute of limitations] is if the insurer has paid something on the claim during the first one year following the accident." (Appendix 29b, emphasis added.)

This interpretation was also reflected long ago in *Pendergast v American Fidelity Fire Ins Co,* 118 Mich App 838, 841-842; 325 NW2d 602 (1982). In rejecting the argument that § 3145(1)'s one-year statute of limitations could be tolled until the claimant determined the appropriate insurer, the *Pendergast* panel wrote: "[i]t is clear that this section is a one-year statute of limitations with a condition permitting claimants to extend the period for recovery of personal protection insurance benefits by giving notice to the insurance company. It is also clear that the plaintiff here neither began her suit against Allstate nor gave it any notice of an intention to claim benefits within the one year following the occurrence giving rise to her claim." *Id.* (citations omitted). The panel's omission of any reference payments beyond "the one year following the occurrence" is telling, and suggests that such payments have long been understood to have no effect on the statute of limitations. The *Pendergast* panel further noted, "[w]hile it is true that the one-year period of limitation is relatively short, it seems consonant with the Legislative purpose in the No-Fault Act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably. The statute attempts to protect against stale claims and protracted litigations." *Id.* Plaintiff's interpretation, on the other hand, is contrary to these goals.

Here, it is undisputed that the accident occurred on May 12, 2009. (Appellant's Brief, p 1.) Plaintiff first filed suit against AAA on May 16, 2011, more than two-years after the accident, by way of his Second Amended Complaint. (Id., pp 1-2.) Therefore, this action could have been timely only if Plaintiff had satisfied the requirements of the one-year notice rule. He did not. ***Defendant did not receive notice of the May 12, 2009 motor vehicle accident, or of***

Plaintiff's claimed injuries from it, within the year following that accident, and Defendant did not pay any benefits within that year. The timeline was as follows:

Motor vehicle accident	→	May 12, 2009
Expiration of "1 year after the date of the accident"	→	May 12, 2010
Notice received (from AAA's insured - *not from the claimant*)	→	June 2, 2010
First payment made	→	July 23, 2010
Suit filed against AAA	→	May 16, 2011

There were no questions of fact concerning this timeline. Plaintiff did not provide written notice (or any notice) within one year, and AAA did not make a payment of benefits within one year. Therefore, the Circuit Court correctly held that the requirements of § 3145(1) had not been met, and the suit was untimely.

Additionally, AAA's position and the Court of Appeals' holding are supported by the last antecedent rule. "[T]he last antecedent rule [is] a rule of statutory construction that provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Hardaway v Wayne County*, 494 Mich 423, 427-429; 835 NW2d 336 (2013). For example, in *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, L.L.C.*, 282 Mich App 410, 414; 766 NW2d 874 (2009), the Court of Appeals interpreted MCR 3.602(I), which states that "[a]n arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court…." *Id.* at 412. Pursuant to the last antecedent rule, the panel held that the phrase "within one year after the award was rendered" applied to the immediately preceding

reference to the filing of the award with the court clerk. *Id.* at 414. It did not apply to the subsequent reference to confirmation by the court, so as to require that the confirmation (rather than filing) occur within the one year period. *Id.*

Here, the parties agree that the word "previously," as used in the first sentence of § 3145(1), is a "restrictive word." (See Appellant's Brief, p 18.) The "last antecedent" to the word "previously" is the phrase "1 year after the date of the accident…." (See Id.) Therefore, the last antecedent rule supports the Court of Appeals' conclusion that the word "previously" refers to "1 year after the date of the accident," i.e., the insurer must have made the payment within "1 year after the date of the accident" in order for that payment to have any effect on the statute of limitations.

While the last antecedent rule is admittedly not unyielding, *Hardaway*, 494 Mich at 427-429, Plaintiff has not offered any cogent alternative. It is undisputed that the word "previously" must refer to something. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) ("is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory"). Plaintiff would have it refer to the filing of a complaint, rather than the "year after the date of the accident." (Appellant's Brief, p 18.) While this argument has some surface appeal, it actually renders the word "previously" redundant, since *all of the actions* described in § 3145(1) have to occur "previous" to the filing of a complaint. Statutes of limitations, after all, do not concern themselves with what takes place *after* a suit has been filed. "Courts must … avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). The word "previously" cannot be "read in tandem with" the word "commenced" because this would give the word "previously" no meaning at all. Under

Plaintiff's interpretation, the statute could say "unless the insurer has made a payment," and it would mean the same thing.

Moreover, Plaintiff's argument regarding "absurd results" attacks a straw man.[16] AAA never asked the Court of Appeals to invoke the absurd results doctrine, and the Court of Appeals never did so. Rather, the panel correctly observed that Plaintiff's position would leave certain PIP claims without a statute of limitations[17] and, this being a statute of limitations, such a result would be extremely problematic (or for lack of a better word, absurd). So rather than invoking what Plaintiff apparently considers to be a dubious doctrine (Appellant's Brief, p 20), the Court of Appeals majority was simply observing that a statute of limitations must be read *to place limitations* on when actions can be commenced. As this Court acknowledged when it granted leave, "the first sentence of § 3145(1)" establishes a "one-year statute of limitations." (Appendix 98a.) Therefore, the provision must be viewed in light of the purposes that statutes of limitations in general are enacted to fulfil. "Although at one time limitations provisions were looked upon with disfavor because of the harsh results worked by their application, the modern view treats them as … 'wise and beneficial' laws common to 'all systems of enlightened jurisprudence.'" *Lothian v City of Detroit,* 414 Mich 160, 166-167; 324 NW2d 9 (1982) (citations omitted). "The statute of limitations is assertable as a 'perfectly righteous [and] meritorious' affirmative

[16] "The 'fallacy of the straw man' is an informal logical fallacy created when an easily refutable position is attributed to an opponent deliberately to overstate the opponent's position." *McNabb v Department of Corrections,* 163 Wash 2d 393, 415 n 4; 180 P3d 1257 (2008) (citation omitted). "In formal logic, the technique of setting up an argument that does not exist and then refuting that misrepresented argument is called the "straw man" fallacy. … The straw man technique is fallacious because it leads to irrelevancies and because it precludes the development and resolution of the true issues of contention." *Canesi ex rel. Canesi v Wilson,* 158 NJ 490, 518; 730 A2d 805, 820 (1999) (O'Hern, J., concurring, citations omitted).

[17] Plaintiff seems to acknowledge this when he argues that "§ 3145(1)'s second exception … does not contain … a temporal limitation...." (Appellant's Brief, p 18.)

defense." *Id.* "Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages, … they penalize plaintiffs who have not been industrious in pursuing their claims, … they afford security against stale demands when the circumstances would be unfavorable to a just examination and decision, … they relieve defendants of the prolonged fear of litigation, … they prevent fraudulent claims from being asserted, … and they remedy … the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Id.* See also *Wright v Rinaldo,* 279 Mich App 526, 533; 761 NW2d 114 (2008).

Apart from advancing the goal of a statute of *limitations*, granting summary disposition under these circumstances was consistent with, if not mandated by, the policy goals of the No-Fault Act. "Although the no-fault system is administered through insurance companies, premiums paid by the owners of motor vehicles to no-fault automobile insurers are governmentally mandated exactions that socialize the cost of providing work-loss benefits and medical payments to all persons injured in automobile accidents." *Thompson v DAIIE*, 418 Mich 610, 622; 344 NW2d 764 (1984) (opinion by Levin, J). "No-fault premiums, then, like social security taxes, do not reflect only the cost expected to be imposed on the system by the person making the payment, but include amounts for costs expected to be imposed on the system by persons who do not contribute thereto or do so in amounts inadequate to provide the benefits they receive." *Id.* at 623. "The no-fault automobile liability act may thus provide the most comprehensive and generous 'social welfare program' yet enacted." *Thompson*, 418 Mich at 624.

In order to carry out this "social welfare program" in a way that does not bankrupt the private corporations that administer it, no-fault carriers must be protected from stale claims. If no-fault carriers are going to be forced to set aside resources for unknown claims that *may* be presented *for the first time* more than a year after an accident, carriers will be unable to "accomplish the goal of providing an equitable and prompt method of redressing injuries in a way which [makes] the mandatory coverage affordable to all motorists." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 154; 350 NW2d 233 (1984). Indeed, our Supreme Court has held that, because no-fault is mandatory, "Michigan motorists are constitutionally entitled to have no-fault insurance made available" at "fair and equitable" rates. *Shavers v Kelley*, 402 Mich 554, 600; 267 NW2d 72 (1978). "Fair and equitable" rates can only be maintained if the one-year-back rule is enforced as written, so as to protect no-fault carriers from stale claims.

Moreover, a rule that stale suits may be resurrected, by the erroneous payment of untimely claims, could not be reconciled with the Act's purpose of ensuring "prompt payment to the insured." *Ross*, 481 Mich at 11. "[T]he primary goal of the [Michigan] no-fault act is to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *McCormick*, 487 Mich at 234. "Under the Michigan no-fault system, automobile accident victims are entitled to prompt payment of certain personal injury protection benefits **as soon as** 'the loss accrues.'" *Bajraszewski v Allstate Ins Co*, 825 F Supp 2d 873, 880 (ED Mich 2011) (emphasis added). Therefore, any *disincentive* to promptly paying bills would contravene this purpose. Yet that is exactly what the rule advanced by Plaintiff would do. Under Plaintiff's interpretation of § 3145(1), before a no-fault carrier could pay any bill, no matter how small, the carrier would first have to investigate whether doing so might be resurrect

an otherwise stale claim – and potentially expose the carrier to future liabilities of an unknown amount which otherwise would have been barred.

No-fault carriers already face severe penalties for not paying a claim quickly enough. See MCL 500.3142(3) (allowing for the imposition of 12% penalty interest if an insurer does not pay "within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained"); MCL 500.3148(1) (allowing for the imposition of attorneys' fees "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment"). The rule advanced by Plaintiff would also penalize insurers who pay too quickly (i.e., insurers who pay a bill before they confirm that the claim would otherwise be stale). Plaintiff's interpretation of § 3145(1) would create a tremendous disincentive to making prompt payment; in this case, AAA's erroneous payment of approximately $22,000, starting 14 months after the accident, supposedly resurrected an otherwise stale claim of approximately *$487,000*. Judge Switalski and the Court of Appeals majority were correct in rejecting such an interpretation and insisting that § 3145(1) be read so as to place *some* temporal limitation on suits.

Before concluding, AAA must address certain arguments that Plaintiff raised below, but does not emphasize in his Brief on Appeal. In opposing AAA's motion, and in seeking reversal in the Court of Appeals, Plaintiff relied primarily upon *Bohlinger v Detroit Auto Inter-Insurance Exchange*, 120 Mich App 269; 327 NW2d 466 (1982). However, *Bohlinger* dealt with the one-year back rule of MCL 500.3145(1); *not* the one-year notice limitation. Moreover, in *Bohlinger* the accident occurred on December 9, 1974 and the insurer began paying in May 1975 (within one year). *Bohlinger,* 120 Mich App at 271. For this reason *Bohlinger* is readily distinguishable.

For the same reason, *English*, 112 Mich App at 470 – which Plaintiff held out to the Circuit Court as "directly on point" (Appendix 71a) – is also readily distinguishable. The insurer in *English* began making payments within six months of the accident. *English*, 112 Mich App at 470 ("On November 29, 1973, plaintiff suffered injuries in an automobile accident. Defendant paid no-fault insurance benefits through May 13, 1974.") In the instant case, it is undisputed that AAA did not make any payments within the year following the accident (Appendix 70a), a fact which renders *English* inapposite.

Finally, AAA must address the affidavit of Wayne Miller, proffered by Plaintiff in the trial court with his Motion for Reconsideration. Because this affidavit was proffered for the first time on reconsideration, it should not be considered part of the record on appeal. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 519; 773 NW2d 758 (2009). As this Court has noted, motions for reconsideration are used to correct palpable error, not to present new evidence or arguments. *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999). Evidence or arguments "offered … for the first time in support of [a] motion for rehearing" are "not properly before the court." *Id.*

Moreover, the affidavit should be disregarded because it constituted an improper attempt to submit expert opinions about a *legal* conclusion. See *Downie v Kent Products, Inc*, 420 Mich 197, 205; 362 NW2d 605 (1984). The authority to decide questions of law, such as statutory construction, "has been allocated to the courts, not to the parties' expert witnesses." *Reeves v K-Mart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998). "[T]he function of an expert witness is to supply expert testimony. This testimony includes opinion evidence, when a proper foundation is laid, and opinion evidence may embrace ultimate issues of fact. However, the

opinion of an expert may not extend to … legal conclusions." *Carson Fischer Potts & Hyman v Hyman,* 220 Mich App 116, 122-123; 559 NW2d 54 (1996). "An expert witness … may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law." *Id.* Here, Mr. Miller essentially tried to tell Judge Switalski that he should have denied AAA's Motion for Summary Disposition. Judge Switalski correctly disregarded such advocacy, offered under the guise of an ostensibly neutral "expert's" affidavit.

In light of these precedents, there is no inconsistency between Judge Switalski's consideration of Sinas & Miller's treatise, on the one hand, and his rejection of Mr. Miller's affidavit, on the other. While Mr. Miller's belatedly proffered affidavit represented improper expert testimony on a pure question of law, there is ample precedent for courts looking to published treatises, as persuasive authority on issues of statutory construction. See *House Speaker v State Administrative Bd*, 441 Mich 547, 562; 495 NW2d 539 (1993); *In re D'Amico Estate*, 435 Mich 551, 559; 460 NW2d 198 (1990); *People v McFarlin,* 389 Mich 557, 563; 208 NW2d 504 (1973); *People v Sell*, 310 Mich 305, 326; 17 NW2d 193 (1945); *People v Lockett,* 295 Mich App 165, 174; 814 NW2d 295 (2012). Put another way, if the contest is between Sinas & Miller's treatise vs. Miller's affidavit,[18] precedent says the treatise should win.

[18] AAA denies, however, that the case turns on such a controversy. Wholly apart from the opinions of Miller and Sinas, Judge Switalski's decision was firmly supported by the aforementioned canons of statutory construction.

CONCLUSION

This Court instructed the parties to address, *inter alia,* whether AAA's "payment of benefits to the plaintiff more than one year after the date of the accident satisfied the second exception to the one-year statute of limitations established in the first sentence of § 3145(1)." (Appendix 98a.) While Plaintiff offers a number of novel perspectives on this question, Plaintiff stops short of explaining when exactly the statute of limitations would have run on his claim. (See Appellant's Brief, pp 17-18.) This omission is telling, as it reveals that Plaintiff's position would turn § 3145(1) into a Statute Without Limitations, since the possibility of an insurer making an erroneous payment more than a year after an accident can never be ruled out. The only interpretation that allows § 3145(1) to be a statute of *limitations* is the one adopted by the Court of Appeals – an interpretation that requires something to happen within a year after the accident in order for a PIP claim to ever be pursued.

Here, Plaintiff (or someone acting on his behalf) failed to provide written notice to AAA within one year of the May 12, 2009 motor vehicle accident. Moreover, AAA did not pay any benefits during that first year after the May 12, 2009 accident. Therefore, the one-year written notice requirement of MCL 500.3145(1) was not satisfied. While Plaintiff attempts to frame this result as some type of anomaly, the Court of Appeals published opinion in this case merely confirmed what Sinas and Miller, *supra* at 399, Logeman, *supra* at § 6.14, and the *Velazquez* panel all recognized years earlier: *if there is no written notice provided within a year of the accident,* and no suit filed within that year, then a payment has to be made within one year after the accident, or the claim is time barred.

For these reasons, Defendant respectfully requests this Honorable Court affirm the Macomb County Circuit Court and the Court of Appeals.

SECREST WARDLE

BY: /s/Drew W. Broaddus

DREW W. BROADDUS (P 64658)
Attorney for Defendant-Appellee
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966
dbroaddus@secrestwardle.com

Dated: June 30, 2015
3047986_2